

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

CV 2006-005616

09/08/2008

HONORABLE JOHN A. BUTTRICK

CLERK OF THE COURT

C. Castro

Deputy

PERLA ESPINOZA, et al.

ELLEN SUE KATZ

v.

ARIZONA STATE BOARD OF EDUCATION, et al. WILLIAM A RICHARDS

RULING

Various motions and the Trial to the Court were taken under advisement on July 14, 2008. This opinion is intended to resolve all outstanding issues.

I. Motion to Decertify.

Defendants move to decertify the class, noting that neither named Plaintiff qualifies as a member of the class because both have graduated from high school. Additionally, Defendants argue that Plaintiffs cannot meet the numerosity, typicality or commonality requirements for class certification. Plaintiffs respond that the two named class members may continue to represent the class regardless of whether they have graduated from high school. Plaintiffs further assert that all requirements for class certification are met pursuant to Ariz. R. Civ. P. 23.

The current class definition is:

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All high school students in Arizona in the Class of 2006 and members of each succeeding senior class, who are members of a senior public high school class beginning with the senior class of 2006; have not graduated from high school; are required under Arizona law to achieve a passing score on all three sections of the Arizona Instrument to Measure Standards (“AIMS”) exam to graduate; have not yet achieved a passing score on all three sections of the AIMS exam; and have satisfied all other non-AIMS requirements to graduate from high school.

The class also includes a subclass of students who are economically disadvantaged. After the Court certified the class, but before trial, the two named representatives, Perla Espinoza and Maynor Gomez, graduated from high school. The trial court “retains the authority to amend the certification order or to decertify the class in light of subsequent developments in the litigation.” Winkler v. DTE, Inc., 205 F.R.D. 235, 239 (D. Ariz. 2001). See also, Carpinteiro v. Tucson Sch. Dist. No. 1, 18 Ariz. App. 283, 286 (App. 1972).

The two named Plaintiffs’ claims became moot after class certification because they passed the AIMS test and graduated from high school. However, a Plaintiff may continue to represent a certified class even after the Plaintiff’s claim becomes moot. See Sosna v. Iowa, 419 U.S. 393 (1975). Although the controversy is no longer alive with respect to Ms. Espinoza and Mr. Gomez, it is very much alive for the class of persons they have been certified to represent. The named Plaintiff must have a live controversy at the time the complaint is filed, at the time the class action is certified, and at the time the court reviews the case. Id. at 402. “The controversy may exist, however, between a named Defendant and a member of the class represented by the Plaintiff, even though the claim of the named Plaintiff has become moot.” Id. Once a class is certified, “the class of unnamed persons described in the certification acquire[s] a legal status separate from the interest asserted” by the named Plaintiffs. Id. at 399. The named Plaintiffs have simply left the class, but the class remains substantially unaltered. But see, Kremens v. Bartley, 431 U.S. 119, 132 (1977) (holding that class certification was inappropriate because the metes and bounds of the certified class had been carved up by changes in the law).

Therefore, this Court rules that the named Plaintiffs continue to be appropriate representatives of the class regardless of the fact that after class certification they passed the AIMS test and graduated from high school.¹

¹ Defendants argue that Perla Espinoza was not a member of the class when the class was certified because as of April, 2007, she had not yet passed all the courses required to graduate. The Court does not reach this question because the Court finds that Mr. Gomez met the requirements of the class when the Complaint was filed and when the class was certified.

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Defendants also argue that the named Plaintiffs' claims are not typical of the claims of the class and do not share material common questions of law or fact. Defendants assert that the determination of the cause of the Plaintiffs' failure to pass the AIMS test demands a detailed, fact-specific inquiry into the factors and experience unique to each student. Rule 23(a)(2) requires that "there are questions of law or fact common to the class." However, "[a]ll questions of fact and law need not be common to satisfy the rule. The existence of shared legal issues with divergent factual predicates is sufficient." Hanlon v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). Although various factors affected each Plaintiff's ability to succeed academically, Plaintiffs universally claim that Defendants failed to provide economically disadvantaged students with the necessary resources to pass the AIMS test. Accordingly, the Plaintiffs have satisfied the commonality requirement. Rule 23(a)(3) also requires that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Representative claims are "typical" if they are "reasonably co-extensive with those of absent class members." Id. at 1020. However, they need not be identical. See id. In the present case, the representative claims are typical of the claims of the class, and therefore, the typicality requirement is satisfied.

Finally, Defendants argue that Plaintiffs cannot meet the numerosity requirement of Rule 23(a)(1). The first prerequisite for class certification is that "the class is so numerous that joinder of all members is impracticable." In Trial Exhibit 14, Defendant's Verified Response to Plaintiffs' Second Set of Non-Uniform Interrogatories to Defendant Tom Horne, Defendant Horne states that there were 80 economically disadvantaged students in the cohort class of 2006 and 106 economically disadvantaged students in the senior class of 2006 who did not graduate due to failure to pass the AIMS test. See Response to Interrogatory 3. Defendant Horne also states that there were 134 economically disadvantaged students in the cohort class of 2007 and 175 economically disadvantaged students in the senior class of 2007 who did not graduate due to failure to pass the AIMS test. See Response to Interrogatory 4. Based on this evidence, the Court finds that Plaintiffs have satisfied the numerosity requirement. See Harik v. California Teachers Ass'n, 326 F.3d 1042, 1051-52 (9th Cir. 2003) (class of 60 people satisfied the numerosity requirement); Jordan v. Los Angeles County, 669 F.2d 1311, 1319 (9th Cir. 1982) (Court would be inclined to find the numerosity requirement satisfied solely on the basis of the number of ascertained class members, i.e., 39, 64, and 71).

Therefore, the Defendants' Motion to Decertify Class is denied.

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II. Motion for Judgment as a Matter of Law.

The parties agree that the Court shall treat Defendants' Motion for Judgment as a Matter of Law as a Motion for Judgment on Partial Findings pursuant to Rule 52(c). Defendants argue that Plaintiffs' desired relief violates the Aggregate Expenditure Limit set by the Arizona Constitution, Article IX, § 21. Defendants also assert that the relief sought violates the separation of powers rule. Defendants further argue that even if Plaintiffs' relief was not barred by the Aggregate Expenditure Limit, the evidence confirms that Defendants have met all the constitutional requirements of the general and uniform clause.

The Aggregate Expenditure Limit is a constitutional cap on the aggregate expenditures that can be made annually by Arizona school districts. The spending cap can only be exceeded upon approval by a vote of two-thirds of the members of the Legislature. Ariz. Constitution, Art. IX, § 21(3). Dr. Essigs testified that in the past two fiscal years, the State's school district budgets have exceeded the Aggregate Expenditure Limit, and that the Legislature has, in both cases, issued the required supermajority votes to allow the additional spending. Defendants argue that because Plaintiffs' claim demands more money from a system that has already repeatedly exceeded the Aggregate Expenditure Limit, the relief demanded would violate the Constitution. However, Defendants are incorrect in their assertion that Plaintiffs seek an order from this Court directing the Legislature to increase funding for the State's educational system. Rather, Plaintiffs seek a declaration that the current funding scheme is unconstitutional as it applies to economically disadvantaged students. Plaintiffs are not seeking an order directing the Legislature to act in any particular manner, but rather to respond with a funding scheme that comports with the requirements of the Constitution.

Defendants further assert that the relief sought violates the separation of powers rule because Plaintiffs are asking the Court to order an expenditure in excess of the Aggregate Expenditure Limit. However, pursuant to the Constitution, the expenditure cap can only be exceeded by a two-thirds vote of the Legislature. As previously stated, Plaintiffs do not seek any specific order from this Court directing the Legislature to fund the educational system in excess of the expenditure cap. Furthermore, as this Court stated in its Minute Entry dated February 7, 2008 and filed February 12, 2008, "while decisions about funding Arizona's education system are constitutionally committed to another branch of government, this does not dispose of the issue of justiciability. As the cited case law has demonstrated, the Court does have the power to review the constitutionality of the Legislature's actions."

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Defendants also argue that Plaintiffs have failed to meet the burden imposed under the Roosevelt and Albrecht cases because they did not prove that either the funding mechanism chosen by the State is itself the cause of “substantial disparities” in resources between school districts, or that the State has failed to provide the funding needed to ensure that no district falls below the standards established by the State.

In Albrecht I and Albrecht II the Court established a two-prong test to measure the constitutionality of the funding of capital facilities under the general and uniform clause: (1) the State must establish minimum adequate facility standards and provide funding to ensure that no district falls below them; and (2) the funding mechanism chosen by the state must not itself cause substantial disparities between districts. 190 Ariz. 520, 524 (1997); 192 Ariz. 34, 37 (1998). The Plaintiffs’ claims focus on the first prong of the test, as they allege that the State does not provide enough funding to ensure that no district falls below the minimum standards established by the State.

The Court in Albrecht I discussed the State’s obligation under the general and uniform clause. The Court stated:

The general and uniform requirement applies only to the state’s constitutional obligation to fund a public school system that is adequate. Defining adequacy, in the first instance, is a legislative task. But, in addition to providing a minimum quality and quantity standard for buildings, a constitutionally adequate system will make available to all districts financing sufficient to provide facilities and equipment necessary and appropriate to enable students to master the educational goals set by the legislature or by the State Board of Education pursuant to the power delegated by the legislature. 190 Ariz. at 524.

Plaintiffs provided some evidence that economically disadvantaged students start out academically behind non-economically disadvantaged students and that the majority of these students continue to be academically behind because the State does not provide enough resources necessary and appropriate to close the achievement gap. Dr. Barnett testified that on average, the achievement gap is eighteen months. Furthermore, Plaintiffs’ experts and witnesses testified that programs and services such as smaller class size, one-on-one tutoring, and parental involvement programs could be effective in helping economically disadvantaged students succeed academically.

Therefore, the Defendants’ Motion for Judgment as a Matter of Law is denied.

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III. Deposition and Hearing Objections.

On July 14, 2008, the parties filed their Joint Notice of Filing Deposition and Hearing Testimony Designations and Objections. The Court now rules on the objections. Where testimony was not objected to or where objections were overruled, the testimony was reviewed and considered by the Court in reaching its verdict.

WITNESS	RULING
Roberta Alley	All objections overruled.
Antonia Badone	Objection overruled.
Bruce Baker	No objections.
Roberto Bravo	Objection overruled.
Karen Butterfield	No objections.
Briana Cauffman	No objections.
Mercedes Celaya	No objections.
Perla Espinoza	No objections.
Chuck Essigs	Objections sustained only as to page 111, line 16 through line 25. Other objections overruled.
Greg Forster	Objections sustained as to all designated testimony from page 49, line 7 through page 104, line 5.
Margaret Garcia-Dugan	Defendants objections are sustained.

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Maynor Gomez	No objections. ²
Riana Gonzales	Objection sustained.
Julie Landers	No objections.
Sandra Leonard	No objections.
Henry Levin	Objection sustained.
Tommie Miel (hearing and deposition)	No objections.
Sarah Neerings	No objections.
Reyna Olvera	Objection sustained.
Jeri Quintero	No objections.
Yvette Rangel	No objections.
Wilma Saroosh	Objections sustained.
Ruth Solomon	Objection sustained.
Dawn Winsor	Objection sustained.
Guillermo Zamudio (hearing)	Objections overruled. (the subject excerpts were not designated.)
Guillermo Zamudio (deposition)	No objections.

² The Court notes the “changes and/or corrections” to the Gomez deposition. These were considered as changed substantive testimony as allowed pursuant to Ariz. R. Civ. P. 30(e). See Valley Nat’l Bank v. National Ass’n for Stock Car Auto Racing, Inc., 153 Ariz. 374 (App. 1987).

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IV. Federal Funds.

Plaintiffs have objected to the admission of any evidence or testimony at trial regarding the federal funding that allows Arizona schools to provide additional programs and services for economically disadvantaged students to succeed on the AIMS exam. Plaintiffs argue that the use of this evidence would allow Defendants to unlawfully “supplant” State funding in violation of federal law. Defendants argue that the Court would have an incomplete picture of the wide selection of programs and services available to students in Arizona if the evidence of federal funding is excluded.

20 U.S.C. § 6321(b)(1) provides:

[a] State educational agency or local educational agency shall use Federal funds received under this part only to supplement the funds that would, in the absence of such Federal funds, be made available from non-Federal sources for the education of pupils participating in programs assisted under this part, and not to supplant such funds.

The supplement versus supplant restriction serves the purpose of Title I, which is to ensure that children in high poverty schools receive extra services. See Flores v. Arizona, 480 F. Supp. 2d 1157, 1162 (D. Ariz. 2007). A violation of 20 U.S.C. § 6321(b)(1) would jeopardize the entire stream of federal educational funds available to the State. See id. at 1162-63. Because the State may not use federal funds to fulfill its educational responsibilities, the Plaintiffs’ objection is sustained and all evidence and testimony concerning federal funding is stricken from the record.

V. Verdict.

The twelve day trial to the Court occurred on June 3-6, 10-13, and 24-27, 2008. On July 14, 2008, the parties filed Combined Designations of Deposition and Hearing Testimony, and the matter was taken under advisement at that time.³ Having considered all the exhibits, witnesses, testimonial designations, and arguments of counsel, the Court now rules as follows:

³ On July 3, 2008, Defendants filed a Notice of Withdrawal of Request for Findings and Conclusions, withdrawing their request for entry of findings of fact and conclusions of law. Therefore, the Court will not enter such findings of fact and conclusions of law, and instead renders its decision upon completion of the submission of trial testimony, including the parties’ final designations of deposition and hearing testimony.

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On April 13, 2007, the Court entered its Order Regarding Class Certification, in which the class was defined as:

All high school students in Arizona in the Class of 2006 and members of each succeeding senior class, who are members of a senior public high school class beginning with the senior class of 2006; have not graduated from high school; are required under Arizona law to achieve a passing score on all three sections of the Arizona Instrument to Measure Standards (“AIMS”) exam to graduate; have not yet achieved a passing score on all three sections of the AIMS exam; and have satisfied all other non-AIMS requirements to graduate from high school.

At that time, the class also included three subclasses of student who met the above criteria: (1) students who are economically disadvantaged; (2) students who are members of racial and ethnic minorities, including students who are Native American, African-American and Hispanic; and (3) English Language Learners. For purposes of the three subclasses, the Court ordered the terms would be as used and/or defined in the reporting requirements of federal law, No Child Left Behind, 20 U.S.C. § 6302, *et seq.* See Order Regarding Class Certification, p.2.

In its Minute Entry dated February 7, 2008 and filed February 12, 2008, the Court ruled on Defendants’ Motion for Summary Judgment. That ruling disposed of all Plaintiffs’ claims except Plaintiffs’ third claim for relief as set forth in the Second Amended Complaint for Declaratory and Injunctive Relief, filed September 28, 2006. That claim alleges that the Defendants have violated the general and uniform clause of the Arizona Constitution, Article XI, § 1, by failing “to provide the programs, services, and resources that are necessary in order for economically disadvantaged students to achieve the state’s prescribed academic standards.” Second Amended Complaint, p. 20, ¶ 110.

Article XI, § 1 of the Arizona Constitution provides that “the Legislature shall enact such laws as shall provide for the establishment and maintenance of a general and uniform public school system, which system shall include kindergarten schools, common schools, high schools, normal school, industrial schools, universities...” To satisfy the requirement of Article XI, § 1, the State’s constitutional obligation is to fund a public school system that is adequate. See Roosevelt v. State of Arizona, 205 Ariz. 584, 589-90 (App. 2003) (quoting Albrecht I, 190 Ariz. at 524). Regarding the State’s obligation under the general and uniform clause, the Court in Albrecht I stated:

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The general and uniform requirement applies only to the state's constitutional obligation to fund a public school system that is adequate. Defining adequacy, in the first instance, is a legislative task. But, in addition to providing a minimum quality and quantity standard for buildings, a constitutionally adequate system will make available to all districts financing sufficient to provide facilities and equipment necessary and appropriate to enable students to master the educational goals set by the legislature or by the State Board of Education pursuant to the power delegated by the legislature. 190 Ariz. at 524.

In Albrecht II, the Court identified a two-prong test to measure the constitutionality of the funding of capital facilities under the general and uniform clause: (1) the State must establish minimum adequate facility standards and provide funding to ensure that no district falls below them; and (2) the funding mechanism chosen by the state must not itself cause substantial disparities between districts. 192 Ariz. at 37. Although Albrecht I and Albrecht II concerned the State's obligation to provide adequate capital facilities, the same test can be applied in the present case to educational programs and services.

In this case, the Court was provided very little evidence regarding where the class members attended school and what resources were or were not available at those schools. Most importantly, Plaintiffs have failed to show a causal connection between programs available or unavailable at any given school district and the failure of Plaintiffs in those districts to pass the AIMS test.

By way of example only, Antonia Badone, the Superintendent of the Yuma Union High School District ("Yuma Union") testified that Yuma Union is not meeting the needs of economically disadvantaged students because of lack of resources. However, Ms. Badone also testified that no student failed to graduate at Yuma Union in the 2005-2006 or 2006-2007 school year because of a failure to pass the AIMS test. Similarly, Dr. Guillermo Zamudio, Superintendent of the Nogales Unified School District ("Nogales"), testified that Nogales needs more services and programs to help economically disadvantaged students succeed academically, such as more qualified teachers, reduced class sizes and more tutoring. However, Dr. Zamudio also testified that in 2006 there was only one economically disadvantaged student who passed all required classes but did not graduate because of a failure to pass the AIMS test. Dr. Zamudio further testified that this student was placed in a summer class and did subsequently pass the AIMS test. With respect to Perla Espinoza, Dr. Zamudio testified that she was a student at Nogales High School, and although she failed to graduate after her senior year, she returned for a fifth year and graduated through augmentation.

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From a student's perspective, Reyna Olvera testified for the Plaintiffs regarding the lack of services available at the high school she attended, Thomas Jefferson High School. However, Ms. Olvera's generalized testimony did little to advance Plaintiffs' claims. In addition to Ms. Olvera's testimony about what she characterized as the lack of available suitable resources, she also admitted to a number of unexcused absences and that she dropped out of her AIMS math class after only a few weeks. Ms. Olvera also even failed to take the AIMS examination on several occasions when it was offered.

Having considered the parties' exhibits, witnesses, testimonial designations, and arguments of counsel, the Court finds that the Plaintiffs have failed to satisfy their burden of proving that Defendants have not met their constitutional obligation under the general and uniform clause.

Verdict is entered in favor of Defendants.

FILED: Exhibit Worksheet

/ s / HON. JOHN A. BUTTRICK

JUDICIAL OFFICER OF THE SUPERIOR COURT